United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7262

To be argued by
THOMAS R. NEWMAN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA,

Plaintiff-Appellant,

—against—

ROBERTA BENTZ and RUDOLPH J. BENTZ, JR.,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

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BRIEF FOR DEFENDANTS-APPELLEES

Statement of the Case

This is a wrongful death action, in which decedent, a pedestrian, and defendants' automobile were involved in an accident on a high-speed limited access highway. The accident occurred in Pennsylvania, and jurisdiction is based on diversity of citizenship.

The jury, after a trial in the United States District Court for the Eastern District of New York before Hon.

Thomas C. Platt, U.S.D.J., awarded plaintiff $10,000 on his claim for conscious pain and suffering and $69,500 (of which $2,500 represented funeral expenses) on the wrongful death claim as support payments to decedent's parents.

At the close of plaintiff's case, and again at the close of all the evidence, defendants moved to dismiss on the grounds that (i) there was no evidence of negligence on the part of the defendants, and (ii) plaintiff's intestate was guilty of contributory negligence as a matter of law. In each case the court reserved decision.

Following the verdict, defendants moved pursuant to Rule 50(b) and (c) of the Federal Rules of Civil Procedure for judgment n.o.v. and, in the alternative, for a new trial pursuant to Rule 59, Fed. R. Civ. Pro. By decision dated April 3, 1975, Judge Platt granted defendants' motions and on April 9, 1975, a judgment was entered in the United States District Court for the Eastern District of New York dismissing the complaint and directing that if the judgment n.o.v. is vacated or reversed, a new trial should be had. Plaintiff has appealed from that judgment.

A prior trial of this action before Hon. Orrin E. Judd, U.S.D.J., and a jury in November 1973, resulted in a verdict in favor of the defendants. During the course of that trial, evidence was inadvertently admitted which indicated that plaintiff's intestate's life was insured under a life insurance policy for $100,000.; the beneficiaries of which were the plaintiff and his spouse (the deceased's parents). Although the court had instructed the jury during the course of trial and in his charge that they should disregard this evidence, it subsequently concluded that its admission was prejudicial error and granted plaintiff's motion for a new trial.

The Decision Below

Judge Platt's comprehensive opinion printed at pages 93a-110a of appellant's appendix is a model of clarity and judicial scholarship. It contains a well-reasoned analysis of the applicable Pennsylvania law. We particularly call to this Court's attention the detailed discussion of *Martin* v. *Marateck,* 345 Pa. 103, 27 A.2d 42, and *Auel* v. *White,* 389 Pa. 209, 132 A.2d 350, two leading decisions by the Pennsylvania Supreme Court that conclusively demonstrate the correctness of the decision below.

We think it not without significance that plaintiff, although citing 27 cases in his brief, has totally ignored the *Martin* and *Auel* cases and the thorough and exhaustive analysis of them at pages 7-13 of Judge Platt's opinion (99a-105a).*

The Relevant Facts on the Issue of Liability

Preliminary.

Before presenting what we believe to be a fair statement of the evidence, we call the Court's attention to two significant facts that have been omitted from appellant's "statement":

(1) The accident occurred on an unlighted, high-speed limited-access highway at a point where pedestrians had no right to be (36 Pa. Stat. §2391.1) and where the defendants had no reason to expect that a pedestrian would walk into their driving lane (see photographs, Defts. Ex. C-2 and C-4 and Pltf. Ex. 2C).

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* Rerefences in parentheses preceded by "Tr." are to the pages of the stenographic minutes of the trial on February 24, 1975. Those preceded by "Tr. 2/20" are to the trial minutes of February 20, 1975. References followed by the letter "a" are to pages of the "appendix for plaintiff-appellant".

(2) A sample of decedent's blood alcohol level (tested by the local coroner as required by Pennsylvania law in the case of fatal accidents, Tr. 95) was found to contain 390 milligrams (0.39) percent of Ethynol (Defts. Exs. A and F; Tr. 104).* Pennsylvania law considers a person to be under the influence of alcohol at 100 miligrams percent (Tr. 104). According to Dr. Shoemaker, the Chief of the Clinical Toxicology Laboratory of the Pennsylvania Department of Health, a blood alcohol level of 0.39 indicates that the individual was "severely intoxicated" with "severe impairment" of motor and brain function (Tr. 105).

Events preceding the accident.

Turning now to the facts surrounding the accident, the evidence, viewed as it must be in the light most favorable to plaintiff (*Lebrecht* v. *Bethlehem Steel Corp.*, 408 F.2d 585), discloses the following:

On April 5, 1972, defendant Rudolph J. Bentz, Jr., then a student at Allentown College of St. Francis, and Roberta Lintz (now Bentz), then his six-year fiancee and now his wife, were invited to dinner at the home of one of his teachers, Professor David Rabaut, in Allentown, Pennsylvania (Tr. 37-8, 46-8). Defendants arrived at about 5:30 p.m. and Rudolph Bentz had two drinks of scotch before dinner, which was served at about 7:30 p.m. (Tr. 38-9, 48-9). During dinner which concluded at 8:00 p.m., Mr. Bentz had a glass of beer (Tr. 39, 49-50). He had

* Dr. Shoemaker testified that the sample was a "good" one (Tr. 123). The reasons two tubes of blood are preferred is "should one of the tubes be damaged or broken in transit, we have a second tube to work with" and in case the blood in one is clogged, having two tubes lessens the chance of that happening (Tr. 111). In this case, neither of these situations occurred and the one sample was adequate for analysis.

had no other alcoholic drinks that day and had nothing of an alcoholic nature after dinner, only coffee (Tr. 39, 48-50).

The defendants left Professor Rabaut's house at about 10:45 p.m. (Tr. 2/20, pp. 5, 21; Tr. 40, 127) for their home in Reading, Pennsylvania (Tr. 50). Rudolph Bentz drove his fiancee's Volkswagen, as he usually did whenever they went someplace together (Tr. 47, 50, 127). He was in no way affected by the two drinks he had had four or five hours earlier, his condition was "fine" (Tr. 40, 50, 126-27).

Defendants proceeded north on Route 309, a four-lane, limited access highway with a center divider on which the posted speed limit was 60 m.p.h. (Tr. 51, see photographs Pltf. Ex. 2C, Defts. Ex. C4). They were travelling at about 55 m.p.h. in the extreme righthand lane, the lane furthest from the divider (Tr. 51, 53, 58, 74, 130). Traffic was light, there were no other cars around defendants in any of the four lanes (Tr. 57, 73-4). Rudolph Bentz was familiar with the road and the surrounding terrain, hilly farm country (Tr. 58, 70-1).

The Volkswagen's headlights were on, the high beams (Tr. 72-3). This was the only light in the area, the roadway was not lighted (Tr. 51, 68; Defts. Ex. C4). There was no obstruction to Bentz's vision (Tr. 12). Defendants were engaged in sporadic conversation, the car radio was off (Tr. 56, 85-6). There is no evidence that the driver was in any way distracted.

The accident.

There were no eyewitnesses to the accident. It occurred at about 11:15 p.m. in the northbound lane of Route 309 approximately 500 feet north of the Cedarcrest Boulevard exit in Salisbury, Pa. (Tr. 51, 58). At that point the road is hilly, there is a 15 to 20 degree upgrade and

the accident took place near the apex of the hill, where the hill levels off (Tr. 59, 66; see photographs, Defts. Exs. C1, 2 and 3).

Rudolph Bentz testified (and, as Judge Platt noted, "there was no evidence to contradict the same", 96a), that

> "as we approached to top of this hill, I remember seeing, like there is a flash or something in front of me, and in a matter of a fraction of a second, there was a smashing sound against my car and my windshield was shattered and the glass was blowing in against me."

The "flash" or "image" or "glimpse of an object" that defendant saw "at almost the precise moment of impact" (Tr. 91), "the split second, the instant before the noise" he heard (Tr. 76), appeared in front of him and "to the left a bit" (Tr. 60). Mr. Bentz did not know what broke the window or what created the thud (Tr. 2/20, Tr. 9, 18).

He further testified that he had no opportunity either to apply his brakes or to slow down from the time he caught a glimpse of the image to his left until the impact "an infinitesimal amount of time", a "split second" later (Tr. 59-60, 87; Tr. 2/20, p. 30). There was no evidence of any skid marks and, as Judge Platt observed (97a) "the evidence quite clearly shows that neither of the defendants was aware of what happened until several minutes after the accident when the occupants of another car came up to them and advised them of the existence of plaintiff's intestate on the highway."

After the impact, defendant managed to keep the Volkswagen under control and bring it to a stop on the right shoulder of the road approximately 400 feet beyond the place where decedent was subsequently found (Tr. 59-60, 88).

Defendants got out of their car, looked around, saw damage to the left front fender, and for the first time "realized that the car had hit something" (Tr. 61). Rudolph Bentz testified (Tr. 61-2):

> "I looked over the roof to my fiancee and said something to the effect, are you okay, and she nodded and said, 'I'm all right,' and I moved to the front of the car and met her there and just looked at each other completely stunned. We had no idea what was going on at that time."

Defendants waved down a passing car and two of the men in it ran back up the hill and then returned and told defendants "something is laying on the road back up there" and "We think you hit a hitchhiker" or "something like that" (Tr. 2/20, pp. 10, 19; Tr. 62).

Shortly thereafter the police arrived (Tr. 62-3). Decedent was pronounced dead by the local coroner at 12:10 a.m. Cause of death was listed as "Accident, Exsanguination, Multiple Severe Lacerations & Compound Fractures" (Defts. Ex. A). There was no evidence that he was ever conscious after the accident.

The coroner's report of death further noted that decedent's "blood alcohol level was found to be 390 mg% or .39% w/v" (Defts. Ex. A). As noted above, this is evidence that decedent had been "severely intoxicated" and indicates severe impairment of "either motor or brain function" (Tr. 104-05).

The photographic evidence.

Since plaintiff's entire case rests on the speculative and conjectural assumption that defendant Rudolph Bentz must, or at least should, have seen decedent before the

impact and in sufficient time to avoid the accident, plaintiff suggests that the decedent was struck head-on, by the front of the Volkswagen (Brief for Applt. pp. 9-10).

The photographic evidence conclusively refutes this suggestion and demonstrates that the front of the car was not touched, that the impact was to the left side of the front fender.* See, particularly, Defendants' Exhibits B-1, 2, 3 and 4 which show that the headlight, front bumper and front of the fender are all unscathed while the left front side of the fender at a point behind the headlight is dented. This plainly indicates that decedent must have walked into the side of the passing car, coming from the direction of the unilluminated center divider of the roadway. These photographs accurately reflect the condition of the car after the accident (Tr. 64, 130).

One of the pictures of the car taken after the accident (Pltf. Ex. 2G, 92a) shows a shadow or mark which was variously described as a "dirt mark" or "smudge" on the left side of the front bumper. Appellant argues that this may be probative of the fact that decedent may have been

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* Photographs have been described as "the perfect witness—an eyewitness who cannot forget and whose memory cannot be distorted" (Gardner, *The Camera Goes to Court,* 24 N. Car. L. Rev. 235).

Time and again it has been held that verdicts contrary to photographic evidence cannot stand (*Walker* v. *Murray,* 255 App. Div. 815, *aff'd.* 280 N. Y. 709; *Szczygial* v. *Isthmian SS Co.,* 285 App. Div. 877; Busch, *Photographic Evidence,* 4 DePaul L. Rev. 195, 200, citing *Hartley* v. *A. I. Rodd Lumber Co.,* 282 Mich. 652, 276 N. W. 712; *Mobile & O. R. Co.* v. *Bryant,* 159 Miss. 528, 132 So. 539; *Lessig* v. *Reading Transit & Light Co.,* 270 Pa. 299, 113 Atl. 381). Photographic evidence has its own independent probative value (Gardner, *The Camera Goes to Court,* 24 N. Car. L. Rev. 233; 3 *Wigmore on Evidence,* § 792a, 1955 Pocket Supp., p. 54).

struck by the front of the car (Brief for Applt., p. 10). Judge Platt succintly answered this contention by observing that (97a) "other pictures introduced into evidence do not reveal any such mark [see Defts. Exs. B1-4]. When questioned, both defendants indicated that such mark might have been made by one or the other of them shortly after the accident when they were sitting on the front of the Volkswagen discussing what possibly could have happened at a time before they were informed of the existence of plaintiff's intestate on the roadway. All of the pictures, however, definitely show (i) a dent on the left side of the Volkswagen's left front fender behind the headlight and (ii) a shattered left side of the windshield."

POINT I

The record demonstrates that there is no evidence to support the asserted claim of negligence.

Appellant concedes at page 21 of his brief that Federal courts follow the *lex fori* in determining whether the evidence is sufficient to establish the claimed cause of action (see, *e.g.*, *Jackson* v. *Coggan,* 330 F. Supp. 1060, 1072 and cases cited thereat). Therefore, whether, as is urged, negligence can be spelled out on the basis of circumstantial evidence must be gauged by applicable New York law.

That law is that when circumstantial evidence is relied on "the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established and to exclude any other hypothesis fairly and reasonably." (*Ruppert* v. *Brooklyn Heights R. Co.,* 154 N. Y. 90, 93.)

The inference contended for must be the only one which can be reasonably drawn from the facts (*Maislin Bros.*

Transp. v. *State of New York,* 15 A. D. 2d 853, 854; *Boyce Motor Lines* v. *State of New York,* 280 App. Div. 693, 696, affd. 306 N. Y. 801; *Lyle* v. *State of New York,* 44 A. D. 2d 239).

In other words, if an accident can with equal reason be accounted for on any theory other than appellee's negligence, appellant's burden of proof has not been met and his action must fail (*Schwartz* v. *Macrose Lumber & Trim Co.,* 29 A. D. 2d 781, *aff'd* 24 N. Y. 2d 856; *Lane* v. *City of Buffalo,* 232 App. Div. 334; *Babcock* v. *Fitchburg R. Co.,* 140 N. Y. 308, 311; *White* v. *Lehigh Valley RR. Co.,* 220 N. Y. 131; *Digelormo* v. *Weil,* 260 N. Y. 192, 200).

An equally applicable principle is that a jury cannot speculate upon probabilities (*Blaikie* v. *Post,* 137 App. Div. 648, 651). Where there are several possible theories to explain the happening of an event, the evidence must be such as to have selective application to the one adopted by the factfinder; two or more plausible explanations as to how an event happened or what produced it remain conjectures where the evidence is without selective application to any one of them (*Friedman* v. *Medtronic, Inc.,* 42 A. D. 2d 185, 187).

"A possibility of causation will not suffice to impress liability upon a defendant. Conjecture is not enough" (*Kalinowski* v. *Joseph T. Reyerson & Son, Inc.,* 242 App. Div. 43, *aff'd* 270 N. Y. 532). "A cause of action must be something more than a guess." (*Digelormo* v. *Weil,* 260 N. Y. 192, 199.)

The narrated facts demonstrate the complete applicability of what the New York Court of Appeals stated in *Wank* v. *Ambrosino,* 307 N.Y. 321, 323-324, an automobile case factually similar to this one.

> "An inference could be justified that defendants' car hit the man, but, since there is nothing at all to show how that came about, there is nothing on which to base a finding of negligent causation. True it is that 'in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence', Noseworthy v. City of New York, 298 N.Y. 76, 80, but before that rule comes into play there must be some showing of negligence, however slight. Noseworthy, and similar cases, describe a method of, or approach to, weighing evidence, but there must be a showing of facts from which negligence may be inferred. Here there was none. The statement by one witness that there were 'drag marks' on the street was denied by another of plaintiff's witnesses who was equally positive that they were 'tire marks'. Only by a process of pure conjecture could such testimony be a basis for a verdict of negligence."

None of the above is attenuated any by application of Pennsylvania law. *Martin* v. *Marateck*, 345 Pa. 103 is exactly in point and establishes the correctness of the decision below.

In the *Martin* case decedent was struck by a vehicle operated on a public highway. He was first seen passing between gasoline pumps and last seen in the middle of the highway when defendant's car was upon him. An examination of the car following the accident revealed damage to the cowl light on the right side and to the right front door. The court pointed out that the mere fact that the decedent was struck by an automobile on a public highway was not proof that the driver had been at fault. It stated that in addition to establishing the fact of the accident, it was incumbent upon plaintiff to demonstrate

in some way what actually happened so as to enable the triers of the fact to fix responsibility. The court declared in language precisely applicable to this case, that:

> "This appellant's evidence obviously fails to do. The record is devoid of any evidence showing how Martin came onto the highway or what length of time he was in the highway before he was struck, and his actions and movements from the time he left the gas pumps until the moment of impact are left wholly unexplained, so that it is impossible to infer from the evidence presented that appellee saw or should have seen him on the highway a sufficient time before the accident to bring the automobile to a stop, if under proper control. Under such circumstances, and in the absence of any evidence that appellee was driving in an improper manner or at an excessive rate of speed, that his attention was distracted, or that his car was mechanically defective, a verdict in favor of appellant would necessarily be based upon pure speculation and conjecture, rather than upon any proof of negligence, and could not be sustained; McAvoy v. Kromer, 277 Pa. 196; Hadhazi v. Zero Ice Corporation, 327 Pa. 558; Pfendler v. Speer, 323 Pa. 443; Brooks v. Morgan, 331 Pa. 235; Wenhold v. O'Dea, supra; Skrutski v. Cochran, supra."

There is no legal basis for rejecting defendants' testimony as to speed and the ocurrence of the accident

There is no reason for denying conclusiveness to the undisputed testimony given by both defendants that the car was being driven well within the permissible speed

limit and that they did not and were not able to see decedent at any time prior to the accident. In *Hull* v. *Littauer*, 162 N.Y. 569, 572, the Court of Appeals said with respect to an interested witness:

> "Generally, the credibility of a witness, who is a party to the action and, therefore, interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it. Where, however, the evidence of a party to the action *is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities; nor, in its nature, surprising, or suspicious, there is no reason for denying to it conclusiveness.*" (Italics supplied.)

The rule was followed by the Supreme Court of the United States in *Chesapeake & Ohio R. R. Co.* v. *Martin*, 283 U. S. 209, 217, where the Court quoted with approval the above language verbatim. The Court also cited with approval *M. H. Thomas & Co.* v. *Hawthorne* (Texas), 280 S. W. 276, 279, as follows, at page 219 of the opinion:

> "A jury cannot arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion or arbitration in it. It is not proper to submit uncontradicted testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness where nothing more than mere interest in the case

> exists upon which to discredit such witness. The testimony must inherently contain some element of confusion or contrariety or must be attended by some circumstances which would render a total disregard of it by a jury reasonable rather than capricious, before a peremptory instruction upon the evidence can be said to constitute an evasion of the right of trial by jury."

Disbelief of defendants' testimony is not a substitute for proof of the facts necessary to establish a cause of action. The Supreme Court had occasion to observe that "disbelief of * * * testimony would not supply a want of proof." *Moore* v. *Chesapeake & O. R. Co.*, 340 U. S. 573, 576, affirming 184 F. 2d 176. Similarly in *Eckenrode* v. *Pennsylvania R.R. Co.*, 164 F. 2d 996, aff'd 335 U. S. 329, the Court wrote at page 999:

> "* * * a belief that * * * testimony is false will not support an affirmative finding that the reverse of that testimony is true."

In *Wallace* v. *Berdell*, 97 N. Y. 13, the New York Court of Appeals wrote at page 21:

> "Even if the inconsistencies and circumstances relied upon as justifying the court in rejecting the testimony of those witnesses were sufficient for that purpose, the discrediting of their testimony did not authorize the court to infer affirmatively the contrary of that which they testified to."

The cases relied on by appellant are not a[illegible]

The facts of the Pennsylvania cases quoted from by appellant demonstrate the vice of the "marshaling of

phrases plucked from various opinions and references to generalizations, with which no one disagrees" (*Danann Realty Corp.* v. *Harris,* 5 N. Y. 2d 317, 322).

> "We must keep in mind that 'opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts' (*Freeman* v. *Hewit,* 329 U. S. 249, 252)." (*Danann Realty Corp.* v. *Harris, supra*).

In each case relied upon by appellant there was evidence of circumstances other than the accident itself from which an inference of negligent driving could be drawn.

In *Frisina* v. *Dailey,* 396 Pa. 280, 150 A.2d 348, decedent, was crossing at an intersection at approximately 6:40 p.m. on a December night. He was crossing from the southwesterly corner to the northwesterly corner. He had practically completed the crossing, being only 2½ feet from the other curb, when he was struck by defendant's car. The area was well lighted and defendant's headlights were on. Defendant was driving in a westerly direction toward the intersection and immediately before the accident had stopped at a stop sign at the northeasterly corner facing directly towards the area where plaintiff was crossing. As stated by the court, plaintiff was "directly in his path" (282).

The court stressed that defendant had failed to make any explanation as to why "the figure of a man, vividly silhouetted before him on an illuminated street, did not register on his retina or on his consciousness as a careful motorist." (396 Pa. at pp. 282-283)

In *Schwartz* v. *Jaffe,* 324 Pa. 324, 188 Atl. 295 plaintiff was a passenger in a car operated by defendant on a highway in the process of construction. It was dark and his headlights were on. He approached the highway's

intersection with the old road travelling at a speed of 40 to 45 miles an hour. While maintaining that speed, he turned on to the old road and proceeded about 75 feet to a point where the car encountered a depression in the road bed. He veered sharply to the right causing him to lose control. To avoid a collision with a telephone pole, he turned the wheel so rapidly that the car overturned.

In sustaining liability, the court pointed out that defendant was familiar with the road, had knowledge that construction was going on and that there might be obstructions on the road requiring a higher degree of care on his part, and that his speed of 40 to 45 miles an hour while making a turn on to a hazardous road surface was something a more prudent man would have avoided.

In *Nalevanko* v. *Marie*, 328 Pa. 586, 195 Atl. 49, decedent was walking at night along a state highway in a westerly direction. He was struck and killed by defendant's car which had been travelling in a westerly direction. The night was clear and "visibility excellent". In sustaining liability, the court point out (328 Pa. at p. 589) that "it is not contended that the deceased stepped suddenly from the side of the road or from behind some object directly into the path of his automobile." The court further stressed (ibid.) that "defendant concedes that when he first saw plaintiff, he was walking in the middle of the highway, still some distance from his automobile."

In *Forsythe* v. *Wohlfarth*, 205 Pa. Super. 416, 209 A.2d 868, decedent, a 78-year old man, was crossing from north to the south at an intersection. He had reached a point at least 12.5 inches into the roadway. Defendant was driving westerly towards the intersection and struck plaintiff. The court noted that the intersection was well lighted and that defendant had clear visibility for a distance "in excess of 200 feet".

In *King* v. *Brillhart,* 271 Pa. 301, 114 Atl. 515, the 16-year old plaintiff was walking along the "edge" of a paved highway in "broad daylight". The roadway was straight. Defendant's car had coasted down a grade from behind plaintiff and struck him. The court found that the evidence indicated "that defendant saw [plaintiff] in ample time to have avoided the accident, but overlooked [his] presence while passing two cars and other people." (271 Pa. at p. 303).

In *Dennis* v. *Munyan,* 139 Pa. Super. 310, 11 A.2d 566, plaintiff was walking westerly on the paved edge of the Lincoln Highway on a rainy, dark, misty night. Visibility was poor. The roadway was straight. Defendant's car approached from the rear and, without warning, struck plaintiff. The evidence indicated that plaintiff had frequently looked to the rear but did not see defendant's car until immediately before being struck.

Defendant had been travelling at a speed of 30 miles per hour, his headlights were on, but he testified that he did not see plaintiff until he was about 22 feet from him. The court pointed out that because of the weather conditions limiting the range of his headlights to only 22 feet, defendant should have reduced his speed.

POINT II

Decedent was guilty of contributory negligence as a matter of law.

Assuming, *pro arguendo,* that the jury could, upon the evidence, somehow have found appellees negligent, it is unequivocally clear that under the decisional law of Pennsylvania, decedent was guilty of contributory negligence as a matter of law (*Auel* v. *White,* 389 Pa. 208, 132 A.2d 350; *Dwyer* v. *Kellerman,* 363 Pa. 593, 70 A.2d 313).

The court below in its opinion (103a-107a) has set forth a painstaking analysis of the reasons why decedent must be deemed guilty of contributory negligence as a matter of law. We cannot improve upon that presentation and adopt it in its entirety, quoting herein only the following portion thereof (107a):

> "If the courts are to hold that a person may get himself (i) into a highly intoxicated condition* (ii) into the middle of a limited access, high-speed highway in the middle of the night and (iii) into contact with the only vehicle proceeding on such highway (travelling within the speed limit and with its headlights lit) and that under the circumstances a jury may determine that there was no contributory negligence, then the doctrine of contributory negligence becomes either a sham or an illusion."

We note additionally that under New York law decedent walking on a limited access highway where he had no right to be (see 36 Pa. Stat. §2391 1) is contributorily negligent as a matter of law (*Wilson* v. *Maiello*, 34 A.D. 2d 221, affd. 28 N.Y. 2d 594).

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* We do not urge that decedent's intoxication, of itself, constitutes contributory negligence as a matter of law. That fact, taken with all the other evidence, explains how the accident occurred.

POINT III

The court's submission to the jury in the first trial of the questions of negligence and contributory negligence and its statement that a verdict in favor of the defendants was against the weight of evidence, was not binding on Judge Platt under the doctrine of the law of the case.

The effect to be given to a prior ruling in a case was discussed by Mr. Justice Holmes in *Messinger* v. *Anderson*, 225 U.S. 436, 444. He there stated:

> "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power."

This Court, in *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F.2d 131, 135, held that the doctrine of the law of the case was a discretionary rule of practice which did not limit the power of the second judge, that the doctrine did not make the first ruling immune from reconsideration by the second judge. The Court wrote:

> "As we view it, the question is in substance the same as that which arises when an appellate court upon a second appeal is faced with an earlier decision of its own, especially if the earlier decision happens to be that of a different panel of judges. The second panel has unquestioned power—'jurisdiction'—to deviate from the first, but as a matter of practice it rarely does so; and there is more reason to refrain than if two different actions are involved, when the only question is whether to fol-

> low a precedent. In any event on both occasions there is no imperative duty to follow the earlier ruling—only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their affairs."

With respect to *Commercial Union of America, Inc.* v. *Anglo-South American Bank Ltd.*, 10 F.2d 937, relied upon by appellant at page 7 of his brief, this Court stated: "we several times questioned the inflexibility of its statement."

Moore's Federal Practice states (Vol. 1B, p. 453) with respect to the *Commercial Union* case, "happily, the Second Circuit has repudiated its older doctrine and now subscribes to the general doctrine." The general doctrine referred to, according to the treatise, is stated in *Peterson* v. *Hopson*, 306 Mass. 597, 603 29 N.E.2d 140:

> "A judge should hesitate to undo his own work. . . . Still more should he hesitate to undo the work of another judge. . . . But until the final judgment or decree there is no lack of power, and occasionally the power may properly be exercised."

In any event, a lower court cannot by its law of the case bind an appellate court having jurisdiction over it (Moore's Federal Practice, Vol. 1B, p. 407).

If, as we have shown above, the evidence demonstrates that there is no cause of action because of the failure of proof as to the claimed negligence or because there is undoubted contributory negligence, then dismissal of the complaint should follow irrespective of any rulings by lower courts.

The record in this case invokes application of what this Court recently said in *Epoch Producing Corp* v. *Killiam Shows Inc., et al.*, —— F. 2d ——, N.Y.L.J. Sept. 4, 1975,

p. 2 cols. 3-4, where it discussed the standards governing the determination of the propriety of a district court granting of a judgment n.o.v.:

> "The evidence must be 'such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict,' [citations omitted]
>
> "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. * * * A mere scintilla of evidence is insufficient to present a question for the jury."

POINT IV

The court below was correct in directing that if its judgment n.o.v. is vacated or reversed a new trial should be had.

In directing that a new trial should be had in the event the judgment of dismissal was vacated or reversed, Judge Platt wrote (108a):

> "As indicated above, the Court feels that the verdict as rendered was contrary to the weight of the credible evidence and, in addition, it also feels that the verdict was so grossly excessive as to indicate a lack of proper deliberation on the part of the jury."

With respect to the $10,000 award on plaintiff's first claim for alleged conscious pain and suffering, we think it sufficient to note that there is absolutely no evidence in this record from which it can fairly be said that the

decedent was ever conscious after the accident or that he felt any pain (see opinion below, pp. 108a-109a). Under these circumstances, no award for pain and suffering is permissible (*Ritter* v. *State*, 74 Misc. 2d 80, 344 N.Y.S. 2d 257, 270; *Blun* v. *Zinni*, 32 A.D. 2d 882, 302 N.Y.S. 2d 504, 506).

With respect to the award of $67,000 in the death action for lost contributions, the arithmetic simply does not support the jury's evaluation of the claim. Rather, it demonstrates the correctness of Judge Platt's conclusion that "even if it were assumed that the decedent would have made some contributions (possibly as much as $100 to $200 a month) to his parents for the balance of their lives, the verdict was far in excess of any such amounts discounted to today's value" (110a).

If we allow the mother, the younger parent, her full life expectancy of 24 years, and assume contributions of $150 per month for those entire 24 years, the jury's award is three times the present value of the alleged loss, assuming interest at the rate of 6%.

CONCLUSION

The judgment appealed from should be affirmed.

Dated: Sept. 12, 1975.

Respectfully submitted,

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ED STATE COURT OF APPEALS :::: FOR THE SECOND CIRCUIT

HRA

VS

BENTZ

AFFIDAVIT OF SERVICE

OF NEW YORK,

Y OF NEW YORK , ss:

BERNARD GREENBERG being duly sworn,

s and says that he is over the age of 21 years and resides at 162 E. 7th, NY, NY

hat on the 12th day of Septemeber, 1975 at

ved the annexed breif for defendant-appellees upon

, Kaszovitz & Weber, 450 Seventh Avenue, NY, NY

action, by delivering to and leaving with said attorneys

three true cop thereof.

EPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the mentioned and described in the said

ent is not a party to the action.

to before me, this 12th

September, 1975 19

Bernard Greenberg

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 450[illegible]95
Qualified in Dela[illegible]are County
Commission Expires March 30, 1977